UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
BISON BUILDING	§	**CASE NO. 09-34452-H2-11**
HOLDINGS, INC., *et al*.,	§	**(Chapter 11 – Jointly Administered)**
	§	
Debtors.	§	

DEBTORS' MOTION TO APPROVE
BIDDING PROCEDURES AND BUYER PROTECTIONS

A HEARING WILL BE CONDUCTED ON THIS MATTER ON MAY 28, 2010 AT 9:30 A.M. IN COURTROOM 400, 515 RUSK AVENUE, HOUSTON, TEXAS. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-ONE DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

To the Honorable Wesley W. Steen,
United States Bankruptcy Judge:

Bison Building Holdings, Inc., Bison Building Materials, LLC, Bison Building GP, Inc., HLBM Company, Milltech, Inc., Bison Building Materials Nevada, LLC, Bison Multi-Family Sales, LLC and Bison Construction Services, LLC (the "Debtors") file this Motion to Approve Bidding Procedures and Buyer Protections.

Nature of the Motion

1. On May 4, 2010, the Debtors entered into an agreement for the sale of substantially all of their operating assets. This agreement will form the foundation for the Debtors' upcoming plan of reorganization and will provide cash for the payment of claims. The agreement contains provisions regarding the Debtors' evaluation of subsequent superior

proposals and the payment of a termination fee in the event that a superior proposal is accepted by the Debtors. The Debtors seek approval of those provisions.

Deadline to Obtain Approval

2. Under the agreement with Stock, the Debtors have 30 days from May 4, 2010 or June 3, 2010 to obtain court approval.

Jurisdiction and Venue

3. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). Venue of these cases is proper in this district pursuant to 28 U.S.C. §§ 1408(1) and (2). Relief is sought pursuant to 11 U.S.C. §§ 105, 363 and 503.

Background

4. On June 28, 2009, the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

5. On January 12, 2010, the Debtors filed their application to employ WoodRock & Co. ("WoodRock") as their investment banker in this case [Docket No. 396]. The Court approved WoodRock's engagement by order entered January 25, 2010 [Docket No. 415].

6. After assembling the necessary marketing and due diligence materials, WoodRock initiated a process on February 18, 2010 designed to evaluate all options to (i) raise new equity capital; (ii) sell all or part of the Debtors' assets; (iii) obtain new debt financing; or (iv) achieve a combination of the foregoing. During the process, WoodRock contacted

approximately 40 different potential financial and strategic partners regarding their interest in the Debtors.

7. WoodRock initially established a deadline of March 31, 2010 for proposals by potential financial partners. After evaluating the potential options, the Debtors determined that none of the proposals would return a meaningful distribution to creditors. Consequently, the Debtors refocused their efforts on potential strategic partners and a sale of part or all of the Debtors's assets. WoodRock's efforts resulted in a series of competitive indications of interest from two strategic partners. WoodRock fully tested each of these indications of interest. From early April until early May, the consideration being offered rose substantially.

8. The process, however, had a negative affect on the Debtors' business. As industry rumors spread, competitors began attempting to hire the Debtors' employees and vendors shortened the Debtors' credit terms. The process also required the Debtors' allocation of substantial resources required in the ongoing operation of the business to responding to due diligence requests.

9. On May 4, 2010, the Debtors entered into an agreement with Stock Building Supply Holdings, LLC ("Stock") for the purchase of the substantially all of the Debtors' operating assets. The gross consideration to be received by the Debtors is in excess of $45,000,000 in cash and assumed liabilities. The sale will be accomplished through a proposed plan that will be filed shortly.

10. As part of the negotiation process, Stock requested certain bidding procedures and buyer protections. The Debtors refused to consider a majority of the requests in order to be able to continue to freely consider any alternative proposals that might arise between the date of the Stock agreement and the confirmation hearing. Likewise, Stock indicated that it was unwilling

to proceed without some protections. The Debtors ultimately agreed to a procedure on how to handle the evaluation of subsequent proposals and the payment of a termination fee should an alternative proposal be received and accepted by the Debtors.

The Termination Fee

11. The Debtors have agreed to the payment of a Termination Fee in the amount of $1,050,000. The Termination Fee is less than 2.5% of the gross consideration and covers all compensation, attorney's fees and reimbursement of expenses of Stock should the Debtors accept another proposal. The relevant language in the Stock Agreement reads as follows:

> **9.02 Effect of Termination; Termination Fee**[1]
>
> (b) If prior to December 31, 2010, for any reason other than termination by Debtors under Section 9.01(e)(i) hereof, Debtors consummate an Alternative Proposal[2] or enter into definitive agreement(s) providing for the implementation of an Alternative Proposal or file a plan(s) of reorganization to implement an Alternative Proposal and thereafter consummate an Alternative Proposal (whether or not the consummation of the Alternative Proposal occurs prior to December 31, 2010), then Debtors shall pay Buyer the Termination Fee within three (3) Business Days (but in no event later than the effective date of any plan of reorganization other than the Reorganization Plan) after such consummation. The Purchaser Protection Order shall provide that the Termination Fee shall be an administrative expense of the Bankruptcy Cases.
>
> (c) The obligation of Debtors to pay the amount payable under Section 9.02(b) (and the payment thereof) shall be absolute and unconditional; such payment shall be an administrative expense under Section 507(a)(2) of the Bankruptcy Code and shall be payable as specified herein and not subject to

[1] The Stock Agreement provides that "***Termination Fee***" means a termination fee in the amount of $1,050,000. The Termination Fee shall be deemed to be an administrative expense of the Bankruptcy Cases.

[2] The Stock Agreement provides that "***Alternative Proposal***" means any inquiry, offer, proposal or plan (whether or not in writing) (other than an offer or proposal by or on behalf of Buyer or any of its Affiliates) for, or any indication of interest in, or any transaction involving: (i) any merger, consolidation, share exchange, recapitalization, business combination or similar transaction involving any of the Debtors that own, individually or in the aggregate, a material portion of the Assets of the Debtors that would constitute Transferred Assets if such Assets were held by Debtors at the Effective Time, (ii) any sale, lease, exchange, mortgage, transfer or other disposition, in a single transaction or series of related transactions, of Assets representing a material portion of the Transferred Assets outside the Ordinary Course of Business, (iii) any sale of equity interests representing, individually or in the aggregate, a majority of the voting power of any of the Debtors that, individually or in the aggregate, own a material portion of the Assets of the Debtors that would constitute Transferred Assets if such Assets were held by Debtors at the Effective Time, (iv) a Restructuring Transaction, or (v) a stand alone plan of reorganization(s) filed by any of Debtors that, individually or in the aggregate, own a material portion of the Assets of the Debtors that would constitute Transferred Assets if such Assets were held by Debtors at the Effective Time and that is inconsistent with this Agreement, or (vi) any combination of the foregoing. The Parties agree and acknowledge that, notwithstanding anything in the previous sentence, none of the transactions or actions relating solely to the Retained Assets or a transaction consummated by a Chapter 7 trustee if the Bankruptcy Court has converted the Bankruptcy Cases to Chapter 7 shall be deemed to be an Alternative Proposal.

any defense claim, counterclaim, offset, recoupment, or reduction of any kind whatsoever. For the avoidance of doubt, in no event shall Debtors be obligated to pay the Termination Fee on more than one occasion.

Bidding Procedures

12. The Debtors and Stock have agreed on a procedure regarding the receipt, review and notice of any other proposals that are received by the Debtors. Under the proposed agreement, the Debtors have agreed that they will not actively solicit, initiate, encourage or facilitate an Alternative Proposal between the execution date of the Stock Agreement and confirmation. All existing discussions between the Debtors and third parties have been terminated. If an Alternative Proposal is received, it will be shared with Stock within 24 hours of receipt. If the Alternative Proposal is determined to be a Superior Proposal[3], the Debtors will provide Stock with four days prior notice of their intent to accept the Superior Proposal. The relevant language in the Stock Agreement reads as follows:

> **5.06 Purchaser Protections**.
>
> (b) Debtors shall immediately terminate, and shall instruct their Representatives to immediately terminate all existing discussions or negotiations, if any, with any Person conducted heretofore with respect to an Alternative Proposal.
>
> (c) From the date of this Agreement until the Closing Date, no Debtor shall, and Debtors shall cause their Representatives to not, (i) solicit, initiate, encourage or facilitate (including by way of furnishing non-public information) any proposal, inquiry, offer or request that constitutes, or that could reasonably be expected to lead to, an Alternative Proposal, (ii) enter into, participate in, continue or engage in discussions or negotiations with any Person regarding an Alternative Proposal, or any proposal, inquiry, offer or request that could reasonably be expected to lead to an Alternative Proposal, or (iii) except as provided in Sections 5.06(d) and (e) and subject to compliance with this Agreement, approve or recommend, or publicly propose to approve or recommend, or enter into any letter of intent, agreement or understanding or agreement in principle regarding, or to implement, an Alternative Proposal, or any

[3] The Stock Agreement provides that "***Superior Proposal***" means any bona fide written Alternative Proposal not solicited, initiated, encouraged or otherwise facilitated in violation of Section 5.06, that is on terms that each Board determines in good faith, after consultation with its outside legal counsel and upon receipt of a written opinion from WoodRock & Co., to be more favorable to the applicable Debtors and their creditors, from a financial point of view, than the transactions contemplated by this Agreement, taking into account all relevant aspects of such Alternative Proposal (in comparison with the terms of the Agreement and any revised offer by Buyer), including financial considerations (including additional transaction costs and the effect of the payment of the Termination Fee and other amounts payable hereunder), the Person or group of Persons making such Alternative Proposal, and the likelihood that the proposed transaction would be consummated substantially in accordance with its terms (taking into account all financing, regulatory, legal, bankruptcy and other aspects of the Alternative Proposal).

proposal, inquiry, offer or request that could reasonably be expected to lead to an Alternative Proposal (an "*Acquisition Agreement*").

(d) Debtors shall promptly advise Buyer, telephonically and in writing, of receipt of any Alternative Proposal and the identity of the Person or group of Persons making the Alternative Proposal, or any proposal, inquiry, offer or request that is reasonably likely to lead to an Alternative Proposal and the identity of the Person or group of Persons making such proposal, inquiry, offer or request (in each case within twenty-four (24) hours after receipt thereof). Debtors shall promptly provide Buyer, in writing and in reasonable detail (within such twenty-four (24)-hour time frame), with a copy of all materials relating to any such Alternative Proposal, or proposal, inquiry, offer or request that is reasonably likely to lead to an Alternative Proposal. Debtors shall promptly, and in any event within twenty-four (24) hours, inform Buyer of any material change in any of the price, form of consideration or other material terms or conditions of any such Alternative Proposal or proposal, inquiry, offer or request that could reasonably be expected to lead to an Alternative Proposal, and the current status of any discussions or negotiations related thereto. Debtors agree that they will not enter into any confidentiality agreement with any Person subsequent to the date hereof which prohibits such Debtors from providing such information to Buyer.

(e) Notwithstanding Section 5.06(c)(iii), prior to obtaining the Confirmation Order, in response to a bona fide written Alternative Proposal that was not initiated, solicited, encouraged or facilitated by any Debtor or any of its Affiliates or their respective Representatives after the date hereof that each of the Debtors' Board of Directors or Board of Managers, as applicable (the "*Boards*") determines in good faith, after receipt of an opinion from WoodRock & Co. and consultation with outside legal counsel, constitutes, or is reasonably likely to lead to, a Superior Proposal, Debtors may, subject to compliance with this Section 5.06 and notwithstanding any other term or provision of this Agreement to the contrary, furnish information and/or draft agreements with respect to Debtors to the Person making such Alternative Proposal (and its officers, directors, employees, attorneys, accountants, consultants, legal counsel, advisors, agents and other representatives) pursuant to a customary confidentiality agreement no less restrictive in any material respect to such Person than the Confidentiality Agreement and which agreement does not prohibit compliance by Debtors with their obligations under this Section 5.06 to provide notices and other information to Buyer; *provided, further*, that promptly upon determination by the Boards that an Alternative Proposal constitutes, or is reasonably likely to lead to, a Superior Proposal, Debtors shall deliver to Buyer a written notice advising it that the Boards have so determined, specifying in reasonable detail the terms and conditions of such Superior Proposal. Debtors shall promptly provide to Buyer any information concerning Debtors which was not previously provided to Buyer (but in no event later than twenty-four (24) hours after any Debtors provided such information to such other party).

(f) Notwithstanding Section 5.06(c)(iii), prior to obtaining the Confirmation Order, the Boards or any committee thereof may terminate this Agreement in accordance with Section 9.01(e)(ii) and enter into any Acquisition Agreement with respect to a Superior Proposal if, but only if, the Boards and Debtors have prior thereto complied with the following clauses (i) through (iii):

> (i) the Boards have received a bona fide written Alternative Proposal that was not initiated, solicited, encouraged or facilitated by any Debtors or their Representatives after the date of this Agreement, and the Boards have determined in good faith, after consultation with its outside legal counsel, (i) that such action is necessary for the Boards to comply with their fiduciary duties imposed by Applicable Law or the Bankruptcy Code, and (ii) after receipt of an opinion from WoodRock & Co., that such Alternative Proposal constitutes a Superior Proposal;
>
> (ii) Debtors have given Buyer four (4) Business Days' prior written notice (the "*Notice Period*") of their intention to take such action, which notice shall attach the most recent draft of any agreement with respect to, and specify the terms and conditions of any such, Superior Proposal (including the identity of the Person or group of Persons making the Superior Proposal) and any material modifications to any of the foregoing, and during the Notice Period, Debtors shall, and shall direct their financial advisors and outside counsel to, negotiate with Buyer in good faith (to the extent Buyer desires to

> negotiate) to make such adjustments in the terms and conditions of this Agreement so that such Alternative Proposal ceases to constitute (in the good faith judgment of the Board, after receipt of an opinion from WoodRock & Co. and consultation with outside legal counsel), a Superior Proposal, and if during the Notice Period any revisions are made to the Superior Proposal and the Boards in their good faith judgment determines, after consultation with WoodRock & Co. and with outside legal counsel, that such revisions are material (it being understood that any change in the purchase price or form of consideration in such Superior Proposal shall be deemed a material revision), Debtors shall deliver a new written notice to Buyer and shall comply with the requirements of this Section 5.06(f) with respect to such new written notice; and
>
> (iii) Debtors have complied with their other obligations under this Section 5.06.
>
> (g) Notwithstanding the foregoing, until the Purchaser Protection Order has been entered or denied by the Bankruptcy Court, the Debtors agree that they will not communicate with any other party with respect to an Alternative Proposal.

13. The Debtors believe that the foregoing procedures are minimally invasive and appropriate under the circumstances.

Requested Relief

14. The Debtors request that the Court approve the Termination Fee and the procedures for the receipt and review of proposals between now and the confirmation hearing. The Termination Fee and the review procedures are reasonable and will allow the Debtors to proceed toward confirmation with the assurance of a significant return to creditors. The proposed Termination Fee is less than 2.5% of the gross consideration being received under the Stock proposal.

15. The Debtors' goals throughout this case have been to maximize the value of their assets, preserve jobs and pay their creditors. The Termination Fee and the bid review procedures have been negotiated with those goals in mind and in an effort to encourage competitive bidding. Those negotiations were spirited and hard-fought. With the bidding complete, the Debtors have been able to structure an agreement that provides certainty to the Debtors' creditors while leaving open the possibility of realizing greater value.

16. Bid protections such as break-up or termination fees are appropriate if the relationship of the parties who negotiated the fees is not tainted by self-dealing or manipulation, the proposed fee does not hamper bidding and the amount of the fee is not unreasonable relative to the proposed purchase price. *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 657 (S.D.N.Y. 1992), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993) (approving termination fee plus reimbursement of expenses); *In re Wintz Companies*, 230 B.R. 840 (8th Cir. BAP 1999), *aff'd*, 219 F.3d 807, 846 (8th Cir. 2000) (stating that the proposed fee and the transaction as a whole must make economic sense and be in the best interest of the estate and its creditors). In holding that break-up fees can provide actual benefit to the estate, the Third Circuit has identified nine factors to evaluate the propriety of a such fees:

(1) whether the relationship of the parties who negotiated the break-up fee is tainted by self-dealing or manipulation;

(2) whether the fee hampered, rather than encouraged bidding;

(3) whether the amount of the fee is unreasonable relative to the proposed purchase price;

(4) whether the unsuccessful bidder placed the estate property in a sales configuration mode to attract other bidders to the auction;

(5) whether the request for a break-up fee served to attract or retain a potentially successful bid, establish a bid standard or minimum for other bidders, or attract additional bidders;

(6) whether the fee request correlates with the maximization of value to the debtor's estate;

(7) whether the principal secured creditors and the official unsecured creditors committee supported the concession;

(8) whether there were safeguards beneficial to the debtor's estate; and

(9) whether there would be a substantial adverse impact on unsecured creditors from approval of the administrative expense.

Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527, 536 (3d Cir. 1999). The Debtors believe that the foregoing factors support the requested relief.

Accordingly, the Debtors request that the Court approve the Termination Fee and bidding procedures as set forth above and grant other just relief as appropriate.

Dated: May 7, 2010.

Respectfully submitted,

Porter & Hedges, L.L.P.

By: 

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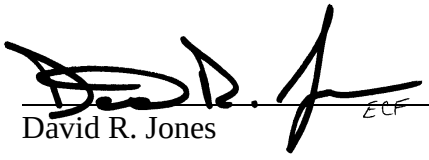
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly served by United States first class mail to all parties listed on the attached Service List and by electronic transmission to all registered ECF users appearing in the case on May 7, 2010.



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